

OPEN RECORDS AND MEETINGS OPINION
2002-O-08

DATE ISSUED: July 19, 2002

ISSUED TO: David A. Sprynczynatyk, Director
North Dakota Department of Transportation

CITIZEN'S REQUEST FOR OPINION

Mark Hager sent a request to this office under N.D.C.C. § 44-04-21.1 asking whether the North Dakota Department of Transportation (DOT) violated N.D.C.C. § 44-04-18 by refusing to release contractor payroll reports filed with the DOT.

FACTS PRESENTED

Labor union representatives requested copies of the certified payroll reports that are filed with the DOT weekly by contractors performing federal-aid projects for the DOT. The payroll reports are filed with the DOT pursuant to contract requirements imposed by the Federal Highway Administration for federal aid highway projects. At some time, Mark Hager, the business representative for the International Brotherhood of Electrical Workers Local Union 714, became aware that the DOT considered the payroll reports to be confidential. In late January 2002, Mr. Hager called the DOT's civil rights office to obtain a copy of a DOT attorney's opinion he thought had been issued on the subject of the confidentiality of the payroll reports. In fact, no DOT attorney opinion had been issued on the subject, and Mr. Hager was told that he should make a written request for a clarification of the DOT's position. Mr. Hager made that written request and it was received by the DOT on February 6, 2002. Mr. Hager's letter requested a "clarification and/or formal opinion" regarding the DOT's policy on release of certified contractor payroll reports. Thirty-seven days later, on March 15, 2002, the DOT director of operations sent Mr. Hager a letter stating the DOT's position on the payroll reports had been analyzed and that access to those records was denied because they related to the financial condition of pre-qualified bidders under N.D.C.C. § 24-02-11. Mr. Hager contests that analysis and contends the response time taken by the DOT was an unreasonable delay in responding.

ISSUES

1. Whether the DOT violated N.D.C.C. § 44-04-18(7) by not responding to Mr. Hager's request for 37 days.
2. Whether the DOT violated N.D.C.C. § 44-04-18 by refusing to release payroll reports as being related to the financial condition of the filers of those reports under N.D.C.C. § 24-02-11.
3. Whether the DOT may withhold portions of the payroll reports in question as confidential commercial or financial information under N.D.C.C. § 44-04-18.4(1).

ANALYSES

Issue One:

Thirty-seven days elapsed from the date of receipt of Mr. Hager's request (February 6, 2002) until the DOT mailed its response (March 15, 2002). Section 44-04-18(7), N.D.C.C., states that the section is violated when a person's right to receive a copy of a record is unreasonably delayed. A request for records must be fulfilled or denied within a reasonable time. 1998 N.D. Op. Att'y Gen. O-04, 1998 N.D. Op. Att'y Gen. O-03. Delays of over a month before providing requested records, or denying the request even when the records do not exist, is unreasonable. 1998 N.D. Op. Att'y Gen. O-20, 1998 N.D. Op. Att'y Gen. O-19.

In this case, the DOT states that the issue was complex and that employees involved in it had other duties. However, in light of the importance of the open records law as a responsibility of agencies, the reasonableness of delays should usually be measured in hours or days, not several days or weeks. 1998 N.D. Op. Att'y Gen. O-22. It is therefore my opinion that in this case, 37 days to respond was an unreasonable delay and constituted a violation of N.D.C.C. § 44-04-18.

Issue Two:

Section 24-02-11(1), N.D.C.C., provides:

1. The director is custodian of, and shall preserve, the files and records of the department. The files and records of the department must be open to public inspection under reasonable regulations. However,

records relating to the financial condition of any party are not open to public inspection if that party:

- a. Has applied for prequalification as a bidder;
- b. Is designated as a prequalified bidder pursuant to this chapter;
- c. Is an applicant under the disadvantaged business enterprise program;
- d. Makes a submission in furtherance of being selected as a consultant;
- e. Is selected as a consultant; or
- f. Is subject to audit by the department.

(Emphasis added.) The section does not define the character of records that are intended as relating to the “financial condition” of a party. Therefore, the section is ambiguous because more than one reasonable interpretation is possible. Interpretive aids such as legislative history may therefore be used in its interpretation. N.D.C.C. § 1-02-39. The language relating to financial condition in N.D.C.C. § 24-02-11 was first enacted in 1985. It applied to those persons applying for prequalification or designated as prequalified bidders. Testimony before a legislative committee noted:

SB 2280 was introduced for the primary reason to make confidential the records contractors are required to submit to the North Dakota State Highway Department. Those records are used by the Highway Department to prequalify firms that are interested in bidding on state work. They are also used to determine how much state work they have bid on and the kinds of work they have bid on.

Hearing on S.B. 2280 Before the House Comm. on State and Federal Government 1985
N.D. Leg. (Feb. 20) (Statement of Curt Peterson).

In 1993, the part of N.D.C.C. § 24-02-11 concerning applicants under the Disadvantaged Business Enterprise (DBE) program was added, but the “relating to the financial condition” language was not changed. The kind of records covered was described in written testimony as follows:

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Going back to the main changes in this bill. The changes are relative to the Disadvantaged Business Enterprise (DBE) program. Problems that are encountered with the open records are:

1. The DBE certification process requires, as part of federal regulations, that a copy of the personal income tax be submitted with the request for DBE certification. This then puts in a public file, information that is personal.
2. We have companies that will not request certification because they do not want this personal information to be part of DOT open records.
3. We have women owned businesses whose husbands have their own businesses, which does not affect the DBE status, but their personal tax return must be submitted. These women are not willing to make their husbands income part of a public file and, therefore, do not request certification. The purpose of adding this language to the bill is to make the financial information provided in the DBE certification process confidential.

Hearing on S.B. 2133 Before the Senate Comm. on Transportation 1993 N.D. Leg. (Jan. 7) (Statement of Ray Zink).

This legislative background makes it appear that the intent of N.D.C.C. §24-02-11 in making financial condition records confidential is to shield those records filed to become a qualified bidder, qualified DBE, or consultant. The type of information at issue is the material required to be deposited with the DOT for that purpose, such as tax returns or matters showing the details of the financial status of a company, possibly including balance sheets or an accountant's opinion. See N.D.C.C. § 24-02-07.3. This does not include information filed with the DOT as part of a construction contract entered into after being pre-qualified as a bidder or a consultant. See also In re Soderlund, 197 BR 742, 745 (Bkrcty. D. Mass. 1996) (financial condition means a balance sheet and/or profit and loss statement or other accounting of an entity's overall financial health and not a mere statement as to a single asset or liability). It is my opinion that the DOT violated N.D.C.C. § 44-04-18 by not releasing contractor payroll records in reliance on N.D.C.C. § 24-02-11.

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Issue Three:

The DOT proposes that the payroll reports may be confidential commercial or financial information under N.D.C.C. § 44-04-18.4(1). This law states that commercial and financial information is confidential "if it is of a privileged nature and it has not been previously publicly disclosed." N.D.C.C. § 44-04-18.4(1). For purposes of this opinion, I will assume the information has not been previously publicly disclosed. Information has a privileged nature under N.D.C.C. § 44-04-18.4(1) if disclosure of the information would be likely to 1) impair the public entity's ability to obtain necessary information in the future or 2) cause substantial harm to the competitive position of the person or entity from whom the information was obtained. 1994 N.D. Op. Att'y Gen. L-194, 2000 N.D. Op. Att'y Gen. L-107.

Thus, determining if a record is confidential under N.D.C.C. § 44-04-18.4(1) involves a two-part analysis. Whether disclosure of a particular document is likely to impair a public entity's ability to obtain necessary information in the future or whether disclosure is likely to cause substantial harm to the competitive position of the person or entity from whom the information was obtained are questions of fact. 1994 N.D. Op. Att'y Gen. L-194, 1998 N.D. Op. Att'y Gen. L-17, 1998 N.D. Op. Att'y Gen. L-77, 1998 N.D. Op. Att'y Gen. O-22, 2000 N.D. Op. Att'y Gen. L-107. However, this office has previously determined in particular fact situations that, as a matter of law, one or the other of this two-part test is met. 1998 N.D. Op. Att'y Gen. L-17 (Disclosure of contract prices will not substantially harm the competitive position of the contractor.); 1998 N.D. Op. Att'y Gen. L-77 (Disclosure of seed kind and variety information will not place the applicant for seed inspection at a competitive disadvantage.).

Federal law requires weekly payroll reports to be filed with the DOT by highway construction contractors. See 23 U.S.C. § 113, and Federal Highway Administration (FHWA) Form 1273, incorporating various federal rules, including 29 C.F.R., part 3. See also Kelso v. Kirk Bros. Mechanical Contractors, Inc., 16 F.3d 1173 (Fed. Cir. 1994). It is highly unlikely that release of the payroll reports would impair the DOT's ability to obtain such information in the future. Contractors will continue to bid on highway projects despite the release of payroll reports. Therefore, it is my opinion that, as a matter of law, disclosure of the payroll reports would not be likely to impair the DOT's ability to obtain such information in the future.

The second part of the analysis calls for determining the existence of a substantial harm to the competitive position of the person or entity from whom the information was obtained by the public agency. The DOT's interpretation of this portion of the analysis included circumstances where a contractor chose to pay Davis-Bacon Act (40 U.S.C. § 276a) wage

rates where doing so was not required due to an exemption, and circumstances where a contractor paid wages higher than those called for by the Davis-Bacon Act. It is DOT's position that substantial harm could be done to the competitive position of the filer of the payroll report if it was disclosed to competitors. The DOT's position is that knowledge of wage practices of a contractor could impair the contractor's ability to be competitive in the future if other contractors had the information.

It is my opinion that these concerns are unfounded. A federal court has previously concluded that the release of much more information than labor costs would not cause substantial harm to the competitive position of the contractor. Martin Marietta Corp. v. Dalton, 974 F.Supp. 37 (D.D.C. 1997) (Release of cost and fee information, including material, labor, and overhead costs, as well as target costs, target profits, and fixed fees will not cause substantial harm to the competitive position of the contractor.).

Also, contractors' payroll reports can be obtained from the federal government, upon request. See Sept. 20, 1990, Memorandum from an administrator in the Federal Highway Administration to the regional federal highway administrators (payroll records should be made available when requested, with names, addresses, and social security numbers withheld). This is still the position of the Federal Highway Administration. See Jan. 16, 2002, Letter from Ronny Hartl to Gary Berreth, N.D.D.O.T. Courts have held that if the information sought to be protected is publicly available through other sources, disclosure will not cause competitive harm. See, e.g., Niagara Mohawk Power Corp. v. U.S. Dep't of Energy, 169 F.3d 16 (D.C. Cir. 1999).

Based on the foregoing, it is my opinion that, as a matter of law, release of contractor payroll records by the DOT will not cause substantial harm to the competitive position of the contractor from whom the information was obtained.

CONCLUSIONS

1. It is my opinion that taking 37 days to respond to the request in this case was an unreasonable delay and constituted a violation of N.D.C.C. § 44-04-18.
2. It is my opinion that reliance on N.D.C.C. § 24-02-11 to withhold contractor payroll records filed with the DOT pursuant to contract constituted a violation of N.D.C.C. § 44-04-18.
3. It is my opinion that the DOT may not withhold portions of the payroll reports as confidential commercial or financial information under N.D.C.C. § 44-04-18.4(1).

STEPS NEEDED TO REMEDY VIOLATIONS

The violation noted in Issue One is not subject to remedy at this time. The violation noted in Issue Two must be remedied by providing specific payroll reports within a reasonable time of receipt of the request for those reports. The requestor is not interested in receiving social security numbers and tax exemption information, so that information may be excised before providing the payroll reports.

Wayne Stenehjem
Attorney General